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CASE NO. 88-761

In The
Supreme Court of the United States

OCTOBER TERM, 1988

LESTER YODER,

Petitioner,

v.

ANTHONY J. CELEBREZZE, JR.,
ATTORNEY GENERAL OF THE STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether a habeas corpus petitioner whose teaching certificate has been revoked as a result of a criminal conviction is "in custody" for the purpose of habeas corpus jurisdiction under 28 U.S.C. Section 2254.

PARTIES

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, the parties to the proceeding are listed in the caption of the case. Petitioner is Lester Yoder. Respondent is Anthony J. Celebrezze, Jr., Attorney General of the State of Ohio.

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OPINIONS BELOW

The September 8, 1988 decision of the United States Court of Appeals for the Sixth Circuit in *Yoder v. Celebrezze*, Case No. 87-4094, is unpublished and unreported (A-1). The October 29, 1987 decision of the United States District Court for the Northern District of Ohio, Eastern Division in *Yoder v. Celebrezze*, Case No. C87-1966A is unpublished and unreported (A-4). The report and recommendation of the United States Magistrate is unpublished and unreported (A-7). The order of the Supreme Court of Ohio is unpublished and unreported (A-10). The decision of the Ohio Court of Appeals for Summit County is unpublished and unreported (A-11). The journal entry of sentence of the Court of Common Pleas of Wayne County, Ohio, is unpublished and unreported (A-19). All are reproduced in their entirety in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 8, 1988. The petition was filed within ninety days of the judgment. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. Section 2241 which provides in part:

* * *

> (c) The writ of habeas corpus shall not extend to a prisoner unless -
>
> > (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> >
> > (2) He is in custody for an act done or omitted

> in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;
>
> * * *

This case also invloves 28 U.S.C. Section 2254 which provides in part:

> * * *
>
> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *

STATEMENT OF THE CASE

The facts which led to the conviction of Petitioner Lester Yoder (hereinafter "Yoder") are summarized in the decision of the Court of Appeals of Ohio:

> Defendant was a teacher at the Apple Creek Developmental Center (ACDC). He was indicted on a single count of the sexual battery of Eugene Jannie, a resident of the center. Yoder was tried to the court and convicted.
>
> * * *
>
> The evidence shows that defendant brought Eugene Jannie to his home. The two men were alone and Yoder took Jannie into a bedroom. Jannie's statement to Ona Jackson reveals that he and Yoder kissed on the mouth and engaged in oral sex. Yoder's own statement to ACDC officials was that he was sexually aroused.

(A-16).

On March 19, 1985, Yoder was convicted by the Court of Common Pleas of Wayne County, Ohio, on one count of sexual battery as defined in section 2907.03(A)(6) of the Ohio Revised Code. (A-19). Thereafter, the trial court sentenced Yoder to a term of one-and-one-half (1 1/2) years imprisonment. (*Id*). This term was suspended and Yoder was placed on probation for two (2) years. (*Id*). Yoder's probationary period ended May 16, 1987. (A-1).

Yoder appealed the decision of the trial court to the Court of Appeals of Ohio and to the Ohio Supreme Court. The state appellate court affirmed the decision of the trial court. (A-11). The Ohio Supreme Court overruled Yoder's motion for leave to appeal. (A-10). The Sixth Circuit Court of Appeals, in its decision, summarized the facts of Yoder's teaching certificate revocation:

> [A]s a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.

(A-2).

On July 30, 1987, Yoder filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division. The petition, filed pursuant to 28 U.S.C. Section 2254, contained the following grounds for relief:

1. The failure of the state to provide a bill of particulars upon a seasonably written request (1) denied the accused due process of law and (2) left the indictment fatally defective.

2. Due process is denied an accused where his conviction rests solely upon testimony erroneously admitted into evidence.

3. The rendering of a verdict by the court in a non-jury criminal trial without hearing final arguments denies an accused 'assistance of counsel' as guaranteed in the Sixth and Fourteenth Amendments and Article I, Section 10 of the Ohio Constitution.

4. Due process is denied an accused where the conviction rests upon evidence insufficient as a matter of law and/or is manifestly against the weight of the evidence.

On August 12, 1987, United States Magistrate Charles R. Laurie filed a report and recommendation with the District Court in which he recommended dismissal of the petition on the ground that the court "is without jurisdiction as the relief sought is unavailable to one not in custody at the time of filing the petition." (A-8). On October 29, 1987, District Court Judge David D. Dowd, Jr. dismissed the petition. (A-4). Yoder appealed to the United States Court of Appeals for the Sixth Circuit. On September 8, 1988, the Court of Appeals affirmed the judgment of the District Court. (A-1).

ARGUMENT AGAINST GRANTING CERTIORARI

THE REVOCATION OF A TEACHING CERTIFICATE AS A RESULT OF A CRIMINAL CONVICTION DOES NOT SATISFY THE "IN CUSTODY" REQUIREMENT OF 28 U.S.C. SECTION 2254 FOR THE ATTACHMENT OF FEDERAL HABEAS CORPUS JURISDICTION.

A federal District Court has jurisdiction over the habeas corpus petition of a petitioner convicted in state court only if he can show that:

> (1) He is *in custody* under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is *in custody* for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is *in custody* in violation of the Constitution or laws or treaties of the United States; * * *

28 U.S.C. Section 2241(c). (Emphasis added).

In addition, 28 U.S.C. Section 2254 sets forth the requirements that:

> [T]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. Section 2254(a). (Emphasis added).

The federal courts have interpreted the "in custody"

language of the statutes to require restraint on a petitioner's liberty:

> Although it is clear that actual physical custody in a penal institution is not required to confer habeas jurisdiction, there must be some significant restraint by the state on the petitioner's liberty in order for the action to lie. We hesitate to expand the right to apply for the writ to a case where it is undisputed that petitioner's liberty is not at all restrained by the state which imposed the sentence which he has served and now wishes to attack.

Ward v. Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1183 (1985). The definition of "custody" has been expanded to include "persons on parole, probation or bail." *Sevier v. Turner*, 742 F.2d 262, 269 (6th Cir. 1984). However, fines or civil money judgments have been held not to constitute "custody." *Id.*

For a federal court to acquire jurisdiction to entertain a habeas corpus petition, the petitioner must be "in custody" at the time the petition is filed. If a habeas corpus petition has been filed while the petitioner was in custody, and jurisdiction in the federal court has attached, the subsequent release of the petitioner will not moot the case if there is a continuing collateral disability that resulted from the conviction under attack. *Carafas v. LaVallee*, 391 U.S. 234, 237-240 (1968). However, this is true only if the jurisdictional custody requirement has been met already — at the time the petition was filed. *Id.* at 236. Thus, the argument of continuing collateral disabilities:

> . . . goes to mootness and not to what is necessary for federal court jurisdiction under section 2254. The existence of collateral consequences of his conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless . . . federal jurisdiction has

already attached.

Ward v. Knoblock, 738 F.2d at 138-139.

Yoder's probation ended on May 16, 1987. He filed his habeas corpus petition on July 30, 1987. This was over two months after his final release from state custody. Thus, Yoder was not "in custody" in July, 1987. Any argument that a continuing collateral disability existed at the time of filing the habeas petition is relevant only to defeat mootness after initial jurisdiction attached at the time of the filing of the petition. Collateral consequences will not meet the definition of custody, and will not give the federal courts jurisdiction in habeas corpus.

Yoder appears to recognize that collateral consequences will not meet the "in custody" requirement. He argues in his petition to this Court that he is not attempting to utilize the continuing collateral consequences theory, by itself, to prove that jurisdiction exists. *See* Petition for Writ of Certiorari, at p.17. Rather, he seeks to broaden the definition of "in custody" to include the revocation of a teaching certificate. He relies specifically on *Jones v. Cunningham*, 371 U.S. 236 (1963) and on *Glover v. North Carolina*, 301 F.Supp. 364 (E.D. N.C. 1969).

In *Jones*, this Court held that the petition of a petitioner released from physical imprisonment did not become moot because the petitioner was under the custody and control of the parole board which imposed numerous conditions that significantly restrained his freedom. 371 U.S. at 243. In *Glover*, the District Court extended the concept of custody in order to confer jurisdiction over a petition even though the petitioner had obtained a final release from his sentence. The District Court held that the unspecified disabilties flowing from a felony conviction were sufficient to confer standing to a petitioner to challenge his conviction in habeas corpus. *Glover*, 301 F.Supp. at 367-368. Respondent has found no reported decision following the holding of *Glover* and expanding the "in custody" requirement to encompass collateral consequences. *See Welch v. Falke*, 507 F.Supp.

264, 266 (S.D. Ohio 1980) (noting that the court therein could find no appeal and no cases following *Glover*). Moreover, in *Harvey v. South Dakota,* 526 F.2d 840 (8th Cir. 1975), *cert. denied,* 426 U.S. 911 (1976), the Eighth Circuit rejected the argument that the disability from pursuing certain professions constituted custody for habeas corpus purposes. *See also Holt v. Commonwealth of Virginia,* 567 F.Supp. 210, 213 n.1 (W.D. Va. 1983).

Meyer v. Nebraska, 262 U.S. 390 (1923), also cited by Yoder in his petition, is not a habeas corpus case. That case overturned as unconstitutional a Nebraska law forbidding the teaching of any language but English.[1] Clearly, no such unconstitutional law is involved here.

Yoder asks this Court to expand the scope of the "in custody" requirement in the federal habeas corpus statutes to include every kind of collateral disability. This Court, and the other federal courts, have included actual incarceration, bond, parole and probation in the definition of custody. However, this Court and the circuit courts have appropriately refrained from further expanding the definition, and should refrain at this time as well. The custody requirement is intended to preserve the remedy of habeas corpus for severe and immediate restraints on liberty. *Hensley v. Municipal Court,* 411 U.S. 345, 351 (1973). The disqualification of a convicted felon from engaging in a certain profession is not such a severe and immediate restraint as to constitute custody for the purpose of habeas corpus.

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[1] This law was aimed at or enforced primarily against German speaking people in a period just after the First World War.

CONCLUSION

The issue raised by Yoder does not merit review by this Court and the Respondent asks this Court to deny the writ of certiorari.

Respectfully submitted,

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February 27, 1989

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No. 87-4094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LESTER YODER,	:	
Petitioner-Appellant,	:	
v.	:	**ON APPEAL FROM THE UNITED STATES**
ANTHONY J. CELEBREZZE, JR., ATTORNEY GENERAL OF THE STATE OF OHIO,	:	**DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**
Respondent-Appellee.	:	(Filed September 8, 1988)

BEFORE: **JONES and RYAN,** Circuit Judges; and **HULL,** Chief District Judge.*

Per Curiam. Lester Yoder, the petitioner-appellant, appeals from the district court's judgment denying his petition for a writ of habeas corpus.

On March 19, 1985, Yoder was convicted, in the Common Pleas Court of Wayne County, Ohio, of one count of sexual battery as that offense is defined by Ohio Revised Code ("O.R.C.") section 2907.03(A)(6).

On May 16, 1985, the trial court sentenced Yoder to a prison term of one and one-half years. This term, however, was suspended and Yoder was placed on probation for two years. Thus, Yoder's probationary period ended May 16, 1987.

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* Honorable Thomas G. Hull, United States District Court for the Eastern Division of Tennessee, sitting by designation.

Furthermore, as a result of his conviction, Yoder's teaching certificate was permanently revoked. That is, on December 22, 1986, a hearing examiner for the Ohio Board of Education, in a proceeding separate and distinct from his court proceedings, revoked Yoder's teaching certificate pursuant to O.R.C. section 3319.31; a statutory provision which mandates the revocation of a teaching certificate when the holder thereof is convicted of certain felonies. This action barred Yoder from the teaching profession; a job which he had held for the prior twenty years.

Yoder appealed his conviction to both the state court of appeals and the state supreme court. On February 5, 1986, the court of appeals affirmed his conviction and on May 14, 1986, the supreme court overruled his motion for leave to appeal.

Thereafter, on July 30, 1987, Yoder filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254 (1982), in the United States District Court for the Northern District of Ohio. Yoder alleged four grounds for relief, including claims relating to assistance of counsel and procedural due process. His petition was originally referred to a magistrate who recommended that it be dismissed for lack of jurisdiction since there had not been a showing that Yoder was in the "custody" of the state of Ohio; a requirement of the statute under which he was proceeding.

Yoder timely filed objections to the magistrate's report, contending that the district court had jurisdiction because although his suspended sentence and probation period expired prior to the filing of his habeas corpus petition, the revocation of his teaching certificate constituted a restraint of liberty sufficient to satisfy the "in custody" requirement of §2254.

On October 29, 1987, the district court issued its opinion holding that it lacked jurisdiction to grant Yoder any relief. The court held that under *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the revocation of Yoder's teaching certificate was a "collateral

consequence" of his conviction and went only to the issue of "mootness," not to the relevant issue of "jurisdiction." Thus, Yoder's petition was dismissed. On November 25, 1987, the court issued a certificate of probable cause and this appeal was timely filed immediately thereafter.

Because we find no reason to disturb the district court's judgment, but instead find it to be based upon the applicable law, that judgment, in its entirety, is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Lester Yoder,	)	
	)	
Petitioner,	)	CASE NO. C87-1966A
	)	
vs.	)	
	)	
Anthony J. Celebrezze, Jr.,	)	
Attorney General,	)	MEMORANDUM OPINION
	)	
Respondent.	)	

(Filed October 29, 1987)

Dowd, J.

In the above-captioned action for habeas corpus relief, the Court has before it the report and recommendation of Magistrate Charles R. Laurie. The Magistrate recommends that the petition be dismissed for lack of jurisdiction. The petitioner has timely filed objections to the Magistrate's report and recommendation. For the reasons that follow, the Court adopts the result recommended by the Magistrate and dismisses the petition.

On March 19, 1985, the petitioner Lester Yoder was convicted in the Common Pleas Court of Wayne County, Ohio, of felonious sexual battery under Ohio Rev. Code §2907.03(A)(6). On May 16, 1985, he received a one and one half year suspended sentence and was placed on two years probation. In addition, because of his felony conviction, Mr. Yoder's teaching certificate was revoked and he lost his rights to vote, to serve as a juror, and to hold public office. See Ohio Rev. Code §§3319.31 and 2961.01.

The petitioner duly exhausted his state appellate remedies, with the Supreme Court of Ohio overruling his motion for leave to appeal on May 14, 1986. On July 30, 1987, more

than two months after his two-year probation period had ended, Mr. Yoder filed the above-captioned action for habeas corpus relief.

The Magistrate has recommended that the petition be dismissed because the petitioner was not in custody at the time the petition was filed, and also because the petition does not indicate any continuing collateral disability. The Magistrate has concluded that the Court is without jurisdiction to entertain the habeas corpus petition. In his objection to the Magistrate's report and recommendation, the petitioner asserts that the Court does indeed have jurisdiction to grant habeas corpus relief. The petitioner claims that he is "in custody" for habeas corpus purposes because he suffers a "continuing collateral disability" as a consequence of his state court conviction. In so asserting, the petitioner points to the fact that his teaching certificate has been revoked and also to the fact that he has lost his rights to vote, serve as a juror, and hold public office. It appears the petitioner has confused the distinguisable concepts of jurisdiction and mootness and the Court must disagree with the petitioner's assertion that the Court has jurisdiction over his petition.

Under the provisions of 28 U.S.C. §2254, a person held unlawfully in state custody may petition a federal district court for habeas corpus relief. For federal jurisdiction to exist, however, the petitioner must be "in custody," either actual or constructive, at the time the petition is filed. *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984) *cert. denied*, 469 U.S. 1183 (1985); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984).

It sometimes happens that a person is released from custody subsequent to the filing of the habeas corpus petition, but while the action is still pending. In such a situation, a question of mootness then arises. Depending on the circumstances, a petitioner's release from custody will not necessarily moot his petition. For example, if the petitioner suffers from a "continuing collateral disabliity as a result of his conviction, his release from custody will not moot his

petition." *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968); *Ward v. Knoblock, supra.*

The question of mootness, however, does not arise unless the federal court acquires jurisdiction at the outset to entertain the habeas corpus petition. Where, as in this case, a petitioner is not "in custody" when he files his petition, federal jurisdiction never attaches and the petition must be dismissed. The Sixth Circuit Court of Appeals has explained the distinction between the mootness concept and jurisdiction concept as follows:

> That argument [of continuing collateral disabilities], however, goes to mootness and not to what is necessary for federal court jurisdiction under section 2254. The existence of collateral consequences of his conviction may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice to satisfy the "in custody" jurisdictional prerequisite unless . . . federal jurisdiction has already attached. *Ward v. Knoblock, supra,* 738 F.2d at 138 (distinguishing *Carafas v. LaVallee, supra,* where custody ended after federal jurisdiction had already attached).

In summary, in the present case Lester Yoder's term of probation ended in May of 1985. Thus, when he filed his petition on July 30, 1985, he was not in custody. Therefore, federal jurisdiction never attached, and the petition must be dismissed, regardless of any continuing collateral disability suffered by the petitioner. Accordingly, the above-captioned action is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.,
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LESTER YODER,	)	Civil Action No. C87-1966-A
	)	
Petitioner,	)	Judge David D. Dowd, Jr.
	)	
vs.	)	REPORT AND
	)	RECOMMENDATION
ANTHONY J.	)	OF MAGISTRATE
CELEBREZZE, JR.,	)	
ATTORNEY GENERAL,	)	Magistrate
	)	Charles R. Laurie
Respondent.	)	

(Filed August 12, 1987)

Laurie, M.,

Petitioner, Lester Yoder, was convicted on March 19, 1985 in the Common Pleas Court of Wayne County, Ohio on one count of sexual battery in violation of Ohio Revised Code section 2907.03(A)(b). A presentence investigation followed, and on May 16, 1985 Petitioner was sentenced to a one and one-half years suspended sentence and placed on two years probation. (Petitioner's Exhibits "C" and "D"). Appeals to the state court of appeals and Ohio Supreme Court were taken.

The present action for federal habeas corpus relief was filed on July 30, 1987 and referred by United States District Judge David D. Dowd, Jr. to this Magistrate on August 11, 1987 for supervision and preparation of a report and recommended disposition. Due to the fact that Petitioner is no longer in custody, this Magistate recommends that this case be dismissed.

Petitioner's habeas corpus action is based on 28 U.S.C. §2254 which provides remedies in federal courts for unlawful state custody. This naturally requires an individual to be "in custody" for there to be federal jurisdiction. *Ward v. Judge*

Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), *cert. denied*, 469 U.S. 1183 (1985). Individuals on parole, probation, or bail may be "in custody" for the purpose of habeas corpus review. *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984). Whereas, an individual who is neither in actual or constructive custody and who does not indicate any continuing collateral disability or consequence of the conviction is not entitled to habeas corpus relief. *Steinberg v. Police Court of Albany, N.Y.*, 610 F.2d 449, 453 (6th Cir. 1979); *Carafas v. LaVallee*, 391 U.S. 234, 237-40 (1968) (mootness); *Harts v. State of Indiana*, 732 F.2d 95 (7th Cir 1984). Thus, when an individual is not in custody at the time the petition is filed, federal habeas corpus relief is unavailable. *Ward v. Judge Knoblock, supra; Sevier v. Turner, supra; compare, Carafas v. LaVallee, supra* (custody ended during course of judicial review).

Petitioner has shown only that his period of probation had ended in May, 1987 which was prior to the time of filing of this action. The petition lists no other place or type of confinement. Nor does the petition indicate any continuing collateral disability. Consequently, this Magistrate respectfully recommends that the Court dismiss the instant petition because it is without jurisdiction as the relief sought is unavailable to one not in custody at the time of filing the petition.

/s/ CHARLES R. LAURIE
United States Magistrate

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time WAIVES the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to Office of Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43266, and to Stephen Walker, 1340 Sumner Court, Cleveland, Ohio 44115, this 12th day of August, 1987, by regular United States Mail.

/s/ CHARLES R. LAURIE
United States Magistrate

IN THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: May 14, 1986

State of Ohio, Appellee,	:	Case No. 86-485
v.	:	ENTRY
Lester Yoder, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Wayne County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Stephen Walker.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY _____ CLERK

/s/DANIEL J. CROWLEY _____ DEPUTY

STATE OF OHIO	)	IN THE COURT OF APPEALS
	) ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	)	C.A. NO. 2099
	)	
Plaintiff-Appellee	)	
	)	APPEAL FROM JUDGMENT
v.	)	ENTERED IN THE
	)	COMMON PLEAS COURT
LESTER S. YODER	)	COUNTY OF WAYNE, OHIO
	)	CASE NO. 84 CR 111
Defendant-Appellant	)	

DECISION AND JOURNAL ENTRY

Dated: February 5, 1986

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BAIRD, J.

This cause came on before the court upon defendant's appeal from his conviction of Sexual Battery in violation of R.C. 2907.03(A)(6). We affirm.

Defendant was a teacher at the Apple Creek Developmental Center (ACDC). He was indicted on a single count of the sexual battery of Eugene Jannie, a resident of the center. Yoder was tried to the court and convicted. He was sentenced to a determinate term of one and one-half years; the trial court suspended the sentence and placed Yoder on probation for two years. Yoder appeals.

ASSIGNMENT OF ERROR 1

"The failure of the state to provide a bill of particulars upon a seasonably written request (1) denied the accused due process of law, and (2)

left the indictment fatally defective."

In its indictment, the Grand Jury found that on July 19, 1984, in Wayne County, defendant

> "***engage[d] in sexual conduct with another, to wit: Eugene Jannie, not the spouse of the offender, and the said Eugene Jannie is a person in custody of law or a patient in a hospital or other institution, and said LESTER S. YODER had supervisory or disciplinary authority over Eugene Jannie,"

On August 23, 1984, defendant requested a Bill of Particulars. The prosecutor, on August 30, responded saying:

> "***the indictment in this matter is sufficient on its face to apprise the defendant of the nature of the charge against him."

Defendant pressed this issue no further, although he did continue to seek discovery of his statements and of other evidence. Generally, an appellate court will not consider an error which appellant's counsel could have called, but did not call, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. *State v. Williams* (1977), 51 Ohio St. 2d 112; *State v. DeRighter* (1945), 145 Ohio St. 552, 555.

Moreover, the record reveals that under the circumstances of this case, the indictment apprised defendant of the charge he faced with sufficient specificity. Prior to being indicted, Yoder was interrogated by ACDC staff, including a security officer. Yoder thereby was made aware that the nature of the sexual conduct involved was fellatio between Yoder and Jannie. The disjunctive language of the statute used in the indictment did not prevent him from preparing his defense.

Had Yoder been prosecuted for sexual conduct other than fellatio or in a capacity other than as one who had disciplinary authority over Jannie, his claim of surprise might stand. However, he was prosecuted for the same sexual conduct

as formed the basis of the ACDC investigation; he was prosecuted in his correct status: a person having supervisory authority over a patient in a state institution. The lack of a Bill of Particulars may deprive a defendant of the opportunity to prepare his defense if the defendant effectively is surprised by the charge on which he ultimately is tried. However, here, defendant has demonstrated no basis for a finding that he was denied the opportunity to prepare. *State v. Abernathy* (Sept. 1, 1982), Wayne App. No. 1808, unreported.

Defendant's first assignment of error is not well taken.

ASSIGNMENT OF ERROR II

> "The admission into evidence of (1) testimony as an excited utterance and (2) testimony as an expert opinion was prejudicial error."

EXCITED UTTERANCE

At trial, Ona Jackson, testified as to Eugene Jannie's statements about sexual conduct with Yoder. Defendant interposed his objection. The trial court permitted Jackson to testify pursuant to Evid. R. 803(2) which excepts from the hearsay rule a statement relating to a startling event while the declarant was under the stress caused by the event.

A child's account concerning the defendant's conduct was held not to be excluded by the hearsay rule, where the following requirements were met:

> "***(a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had

been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. ***."

State v. Duncan (1978), 53 Ohio St. 2d 215, paragraph one of the syllabus; *State v. Litton* (June 23, 1982), Summit App. No. 10514, unreported.

In *Litton*, the defendant had sexual conduct with his nine-year old victim in the morning. The child returned home at 3:00 p.m. and played with her cousin for the remainder of the day. Only at bedtime did she tell her cousin of what had happened. The cousin reported to their grandmother. Both of her grandparents and her mother questioned the victim. When her father came home, he questioned the victim for two hours before notifying police. Applying *Duncan*, this court held that the child's statement to her father was admissible because it appeared that the declarant was still dominated by the nervous excitement generated by the startling event (sexual conduct). *Litton*, supra; *State v. Yost* (Sept. 18, 1985, Summit App. No. 12065, unreported.

The record in this case supports findings that: (A) There was an occurrence startling enough to produce a nervous excitement. Despite defendant's argument, there is insufficient evidence of Jannie's prior sexual history to support a finding that sexual contact with a teacher would not have been a startling event. (B) Jannie's statement was made while he was still dominated by the nervous excitement generated by defendant's conduct. (C) The statement clearly related to the startling event. (D) Jannie had an opportunity to observe personally the matters asserted in his declaration. Under *Duncan*, Jannie's statement to Jackson properly was

admitted.

EXPERT TESTIMONY

The defendant also challenges the admission of the opinion testimony of Dr. Harold Blakelock, based upon the insufficiency of his credentials and lack of personal contact with Jannie. Reviewing the record, we find that Dr. Harold Blakelock was qualified as an expert witness by his knowledge, skill, experience, training or education. Evid. R. 702. Dr. Blakelock's opinion was based upon facts perceived by him and evidence admitted at trial. Evid. R. 703. Accordingly, his opinion properly was admitted as an aid to the court in making the necessary determinations as to the admissibility of Jannie's statement as an excited utterance under the strictures of Evid. R. 803(2) and *Duncan*, supra.

Defendant's second assignment of error is not well taken.

ASSIGNMENT OF ERROR III

> "The rendering of a verdict by the court in a non-jury criminal trial without hearing final arguments denies an accused "assistance of counsel" as guaranteed in the Sixth and Fourteen Amendments and Article 1, Section 10 of the Ohio Constitution."

Defendant argues that the lack of closing argument in his case constitutes a violation of his right to assistance of counsel under *Herring v. New York* (l975), 422 U.S. 853. However, in *Herring*, the defendant affirmatively was denied closing argument, defense counsel having requested final argument and that request having been denied pursuant to a New York statute granting discretion to trial courts to grant or deny final summation.

In the instant case, defendant did not request final argument, nor did he raise the issue of summation to the trial court. We agree with the Twelfth District Court of Appeals; absent an affirmative denial of closing argument, the lack of such argument is not a basis for reversal. *State v. Brown*

(Dec. 30, 1982). Clermont App. No. 1210/1211, unreported.

Defendant argues that the simple absence of summation is reversible error unless there is a "plain showing that there was an intentional waiver of the right." *Columbus v. Woodrick* (1976), 48 Ohio App. 2d 274. However, in *Woodrick*, the court was faced with a "summary pronouncement" of the verdict by the trial court. Here, the record reveals that the court had discussed its analysis of the evidence in chambers with counsel and did not wish to repeat that assessment in court. No objection was registered by defendant's counsel. Given his competent representation of defendant throughout this trial, it is clear that, had counsel wished to object at this point, he would have done so.

Defendant's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "Due process is denied an accused where the conviction rests upon evidence insufficient as a matter of law and/or is manifestly against the weight of the evidence."

A reviewing court will not reverse a verdict where there is substantial evidence upon which a trier of fact reasonably could conclude that all the elements of an offense have been proved beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St. 2d 169, syllabus. Our review, thus, is confined to a determination of whether there was substantial evidence. *Eley, supra* at 172. The evidence shows that defendant brought Eugene Jannie to his home. The two men were alone and Yoder took Jannie into a bedroom. Jannie's statement to Ona Jackson reveals that he and Yoder kissed on the mouth and engaged in oral sex. Yoder's own statement to ACDC officials was that he was sexually aroused. From this evidence, the trier of fact reasonably could conclude, beyond a reasonable doubt, that Yoder committed sexual battery upon Jannie.

Defendant's fourth assignment of error is not well taken.

The judgment of the trial court is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Wayne Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

WILLIAM R. BAIRD
- FOR THE COURT -

QUILLEN, J.
HOFSTETTER, J.
CONCUR

(Hofstetter, J., Retried Judge of the Eleventh District Court of Appeals, sitting by assignment pursuant to Article IV, §6 (C), Constitution).

APPEARANCES:

ROBERT J. BROWN, Assistant Prosecuting Attorney, Silver Building, Wooster, Ohio 44691 for Plaintiff

STEPHEN WALKER, Attorney at Law, The Brownell Building, 1340 Sumner Court, Cleveland, Ohio 44115 for Defendant.

WAYNE COUNTY COMMON PLEAS COURT

STATE OF OHIO	)	
Plaintiff	)	Case No. 84-CR-111
vs.	)	
LESTER S. YODER	)	JUDGMENT ENTRY
Defendent	)	

On March 19, 1985, the defendant was found guilty by a trial to the Court of Sexual Battery, an Aggravated felony of the third degree, in violation of Section 2907.03 (A) (6) of the Ohio Revised Code.

Presentence investigation and report was ordered by the Court upon entry of conviction, and defendant appeared before the Court for sentencing on May 16, 1985, represented by counsel, Mark Baserman. Receipt of the presentence report is acknowledged.

Upon inquiry, the defendant was unable to show cause as to why judgment should not be pronounced. The Court indicated that it had taken into consideration the criteria for sentencing and probation, as set forth in Sections 2929.12 and 2951.02, respectively, of the Ohio Revised Code.

The Court did thereupon sentence said defendant to serve a determinate term of one and one-half (1 1/2) years at the Ohio Department of Corrections and Rehabilitation, Chillicothe, Ohio. Sentence is herewith suspended, and defendant is placed on probation for two (2) years, subject to the following terms and conditions:

1. Obey all local, state and federal laws.

2. Abide by the rules and regulations of the Probation Department.

3. Pay the costs of this action taxed at $_____ .

_____
JOHN H. SCHULER
COMMON PLEAS JUDGE

_____
Robert J. Brown
Assistant Prosecuting Attorney